

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 367 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and

MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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RAMAMSINH RAVAT

Versus

STATE OF GUJARAT

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Appearance:

MR SG UPPAL for Petitioner

MR. AJ DESAI ASST. PUBLIC PROSECUTOR for Respondent No. 1

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CORAM : MR.JUSTICE N.J.PANDYA and  
MR.JUSTICE R.BALIA.

Date of decision: 25/09/96

ORAL JUDGEMENT

(Per N.J.Pandya,J)

1. The accused appellant of Sessions Case No. 69 of 1991 of the Court of Sessions Judge, Banaskantha at

Palanpur came to be convicted for offence under Section 17 of NDPS Act and awarded sentence of ten years rigorous imprisonment and fine of Rs.1.00 lakh and in default rigorous imprisonment for two years.

2. Looking to the deposition of the P.S.I. Mr. Yagnik, paper book page 89, the case of the prosecution is not that of prior information. On 16.3.1991 at about 5.30 p.m. while on duty for providing security to a VIP at the checkpoint of border between the State of Rajasthan and the State of Gujarat, police party was waiting when at about 7.00 p.m. they saw two persons coming from Rajasthan towards the checkpoint. On seeing the police party the two persons started running away under suspicious circumstances and therefore they were chased by the members of the police party. On being apprehended, the said P.S.I., Shri Yagnik took precaution of taking two persons as panchas from amongst the passengers of taxi which had halted at the checkpoint. During the search 1 kg. 200 gm. of opium was found, which is the total quantity recovered from the accused.

3. Learned advocate Shri Uppal appearing for the appellant has drawn our attention to the fact that in the aforesaid background, Section 41 and 42 of the NDPS Act may not apply but Section 43 clause (b) and clause (a) would be attracted and in that event requirement of Section 50, which is held mandatory one as per Balveersingh's case (AIR 1994 SC 1872) not having been complied, the accused must get the benefit thereof.

4. Later on the Honourable Supreme Court of India while dealing with Saiyad Mohd. Saiyad Umar Saiyad and others vs. State of Gujarat 1995(3) SCC 610, at page 615 in para 10 has amplified the law on the point to the effect that it being a statutory requirement, the prosecution cannot fall back upon the provisions of Section 114 Illustration E for raising presumption as to official act having been done in the manner required to be done.

5. Section 50 is a safeguard to the accused against whom statutory presumption under NDPS Act would operate and it is his duty to explain and the burden is cast on him to explain the possession of contraband article. That being the position, under NDPS Act by way of safeguard an option is being given to the accused of being searched instead of by the police officer who apprehended him either by a gazetted officer or by a Magistrate. In order to see that this right is effectively made available it has been interpreted by

aforesaid judicial pronouncements that the accused first of all be informed of having such right and thereafter the accused exercised the option, the officer has to act according to it.

6. In view of the aforesaid two judgements, when from the record it is not possible to gather that the accused was informed of he having an option of the aforesaid nature and when Mr. Yagnik, Exb.43 and all other witnesses being silent on the point, obviously, there is violation of right given to the accused under Section 50. This would prove fatal to the prosecution.

7. Accepting the said submission of Shri Uppal, we allow the appeal. The order of conviction dated 7.3.1992 is set aside. The accused is ordered to be set at liberty forthwith if not required for any other purpose. Fine, if paid, is ordered to be refunded.

(N.J.Pandya, J)

25.9.1996 (Rajesh Balia, J)

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